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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM B. COWEN, Regional Director of Region 21 of the National Labor Relations Board, for, and on behalf of, the NATIONAL LABOR RELATIONS BOARD, Petitioner, v. PACIFIC GREEN TRUCKING, INC. Respondent.	Civil No. 2:19-CV-00663 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SEC. 160(J)] Date: Time: Courtroom: Judge:

Table of Contents

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

COURTS OF APPEALS CASES

DISTRICT COURT CASES

NLRB CASES

OTHER AUTHORITIES

I. INTRODUCTION

This case involves Pacific Green Trucking, Inc.'s (Respondent), swift retaliation against a union supporter, quashing the rights conferred upon its employees by Section 7 of the National Labor Relations Act (Act). Respondent threatened and discharged a known union proponent shortly after it caught wind of his union activities. Without an immediate injunction, Respondent's illegal conduct will succeed in suppressing the union organizing drive.

On behalf of the National Labor Relations Board (Board), the Regional Director of Region 21 (Petitioner), seeks a temporary injunction pursuant to Section 10(j) of the Act, as amended, 29 U.S.C. Sec. 160 (j) (Section 10(j)), pending the Board's disposition of the unfair labor practice charge against Respondent in Board Case 21-CA-226775. The Board's Petition is based on the substantial likelihood that Petitioner will establish in the Board's administrative proceeding that Respondent committed the unfair labor practices alleged in the Complaint; that failure to obtain an injunction during the pendency of the administrative proceeding will irreparably harm employees, the International Brotherhood of Teamsters (Union), and the Board's remedial authority; that the balance of the equities tips in favor of granting an injunction; and that the public interest will be served by granting the injunction.

II. PROCEEDINGS BEFORE THE BOARD

The Union filed unfair labor practice charge 21-CA-226775 on September 4, 2018[1], and amended that charge on October 11. Ex. 1, pp. 12-13.[2] All parties

[1] Unless otherwise stated, all dates are in 2018.

[2] The exhibits referred to herein are attached to the Petition for a Temporary Injunction. They will be referred to as "Ex." followed by the exhibit number, and the page number.

presented evidence in the investigation of the charge. Once Petitioner completed its investigation, it issued against Respondent a Complaint and Notice of Hearing (Complaint) on November 29. Ex. 2, pp. 14-18. The Complaint alleges that Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1)[3] and (3)[4] of the Act (29 U.S.C. § 158(a)(1) and (3)). On December 13, Respondent filed its Answer to the Complaint (Answer). Ex. 2, pp. 19-22.

This matter was litigated at a hearing before Administrative Law Judge (ALJ) Jeffrey D. Wedekind on January 14 and 15, 2019.[5] The parties' post-hearing briefs to the ALJ are due on February 1, 2019. The ALJ's decision and recommended order will issue as soon as possible after that date. Ex. 3, pp. 28, 377. Once the decision and recommended order issues, any party may file exceptions to the decision to the Board.

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[3] Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act (29 U.S.C. Sec. 157, herein Section 7). Section 7 provides, in relevant part, that employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

[4] Section 8(a)(3) of the Act prohibits employers from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

[5] Section 10(j) petitions are not to be denied on the basis that an ALJ will soon hear, or recently heard, the case. *Fleishchut v. Nixon Detroit Diesel*, 859 F.2d 26, 31 (6th Cir. 1988). The reason is because the ALJ does not issue a Board Order; he or she merely submits a recommendation to the Board. 29 C.F.R. Sec. 102.45(a). Any party—Respondent, the Charging Party, or the General Counsel—may file exceptions to the ALJ's decision with the Board. 29 C.F.R. Sec. 102.46(a).

III. THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions that are "just and proper" pending the Board's resolution of unfair labor practice proceedings. 29 U.S.C. § 160(j).[6] Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint. *See Scott v. Stephen Dunn & Associates,* 241 F.3d 652, 659 (9th Cir. 2001); *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 n.3 (9th Cir. 1994) (en banc) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. at 8, 27 reprinted in 1 Leg. Hist. 414, 433 (LMRA 1947)).

In the Ninth Circuit, district courts rely on traditional equitable principles to determine whether interim relief is appropriate. *Coffman v. Queen of the Valley Med. Ctr.*, 895 F.3d 717, 725 (9th Cir. 2018); *Small v. Avanti Health Sys., LLC,* 661 F.3d 1180 (9th Cir. 2011); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011). Thus, to obtain a preliminary injunction, the Regional Director must establish (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in the

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[6] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Board's favor, and (4) that an injunction is in the public interest. *Frankl*, 650 F.3d at 1355 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374 (2008)). These elements are evaluated on a "sliding scale" in which the required showing of likelihood of success decreases as the showing of irreparable harm increases. *See Alliance for the Wild Rockies v. Cotrell*, 632 F.3d 1127, 1131-1134 (9th Cir. 2011). When "the balance of hardships tips sharply" in the Director's favor, the Director may establish only that "serious questions going to the merits" exist so long as there is a likelihood of irreparable harm and the injunction is in the public interest. *Frankl*, 650 F.3d at 1355 (quoting *Alliance for the Wild Rockies*, 632 F.3d at 1135). The "serious questions" standard permits the district court to grant an injunction where it "cannot determine with certainty that the [Director] is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction." *Alliance for the Wild Rockies*, 632 F.3d at 1133 (quoting *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010)).

A. Likelihood of Success

Likelihood of success in a § 10(j) proceeding "is a function of the probability that the Board will issue an order determining that the unfair labor practices alleged by the Regional Director occurred and that the Ninth Circuit would grant a petition enforcing that order." *Frankl*, 650 F.3d at 1355. S*ee also Small*, 661 F.3d at 1187. In evaluating the likelihood of success, "it is necessary to factor in the district court's lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations by the courts of appeals." *Frankl*, 650 F.3d at 1356 (quoting *Miller*, 19 F.3d at 460). The Regional Director need not prove, however, that the respondent committed the alleged unfair labor practices by a preponderance of the evidence as required in the underlying administrative proceeding. *See Scott*, 241 F.3d at 662. Such a standard would "improperly

equat[e] 'likelihood of success' with 'success.'" *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981).

Rather, the Regional Director makes a threshold showing of likelihood of success by producing "some evidence" in support of the unfair labor practice charge "together with an arguable legal theory." *Small*, 661 F.3d at 1187 (quoting *Frankl*, 650 F.3d at 1356). *See also* Scott, 241 F.3d at 662 (the Regional Director need only show "a better than negligible chance of success"). Therefore, in a § 10(j) proceeding, the district court should sustain the Regional Director's factual allegations if they are "within the range of rationality" and, "[e]ven on an issue of law, the district court should be hospitable to the views of the [Regional Director], however novel." *Frankl*, 650 F.3d at 1356. "A conflict in the evidence does not preclude the Regional Director from making the requisite showing for a section 10(j) injunction." *Scott*, 241 F.3d at 662.

B. Balancing the Equities

In applying traditional equitable principles to a § 10(j) petition, courts must consider the matter in light of the underlying purpose of § 10(j), which is "to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge." *Miller*, 19 F.3d at 459-60. In evaluating the likelihood of irreparable harm to the Act's policies and in considering the balancing of equities, district courts must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." *Id*. *See also Small*, 661 F.3d at 1191; *Frankl*, 650 F.3d at 1362.

Likely irreparable injury is established in a § 10(j) case by showing "a present or impending deleterious effect of the likely unfair labor practice that would likely not be cured by later relief." *Frankl*, 650 F.3d at 1362. The Director can make the requisite showing of likely irreparable harm either through evidence

that such harm is occurring, *see, e.g.*, *Scott*, 241 F.3d at 667, 668, or from "inferences from the nature of the particular unfair labor practice at issue [which] remain available." *Frankl*, 650 F.3d at 1362. The same evidence and legal conclusions establishing likelihood of success, together with permissible inferences regarding the likely interim and long-run impact of the likely unfair labor practices, provide support for a finding of irreparable harm. *Small*, 661 F.3d at 1191 (quoting *Frankl*, 650 F.3d at 1363).

The public interest in a Section 10(j) case "is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." *Frankl*, 650 F.3d at 1365 (quoting *Miller*, 19 F.3d at 460). *See also Small*, 661 F.3d at 1197. A strong showing of likelihood of success and of likely irreparable harm will establish that Section 10(j) relief is in the public interest. *Coffman*, 895 F.3d at 729 (quoting *Frankl*, 650 F.3d at 1365). *See also Bloedorn v. Francisco Foods, Inc*., 276 F.3d 270, 300 (7th Cir. 2001).

IV. STATEMENT OF FACTS

A. Background

Respondent, a California corporation with a facility located in Wilmington, California, is engaged in transporting cargo from Los Angeles-area ports to railroad terminals and warehouses. (Ex. 2, pp. 14, 19; Ex. 3, p. 81, 163-164, 337). Respondent's operations are managed by its General Manager, Vicente Zarate (Zarate). It employs approximately 80 to 90 drivers who transport cargo in Respondent's trucks. Ex. 3, p. 337. Ricardo Bonilla Colindres (Bonilla) began working for Respondent in February as a driver. Ex. 3, p. 163. Bonilla was a good driver according to Zarate. Ex. 3, p. 343.

B. Bonilla Plays a Central Role in the Union's Organizing Activities

The Union began attempting to organize Respondent's drivers in June. At that time, Union Organizer Miguel Cubillos (Cubillos) made contact with two drivers who had been active in a previous organizing campaign concerning another

transport company. Ex. 3, p. 80. Through these initial contacts, Cubillos met driver Bonilla. Ex. 3, p. 82-83. Bonilla quickly became a primary proponent of the Union early in the campaign. Ex. 3, p. 96. Between late June and his termination on August 25, Bonilla spoke with over a dozen other drivers about the union organizing campaign. Ex. 3, p. 181. He also kept in frequent contact with Cubillos and put drivers who expressed interest in the Union in touch with Cubillos. Ex. 3, p. 182. Between June and August, Cubillos held several meetings with Respondent's drivers in a local restaurant and the Union's office in Long Beach, California. Bonilla participated in these meetings and successfully recruited at least one driver who also participated in the Union's meetings. Ex. 3, p. 81-83, 86-87, 131. In addition to working with Bonilla, Cubillos met more of Respondent's drivers by approaching them at worksites away from Respondent's facility. Ex. 3, p. 100.

C. Respondent Threatens to, and then Does, Fire Bonilla Because He Supports the Union

In the weeks leading up to Bonilla's August 25 termination, it became clear that Respondent had learned about the Union's activities and was determined to quash the organizing campaign. On about August 7, Bonilla approached General Manager Zarate, and asked for a loan to assist his ailing mother. Ex. 3, p. 189. Zarate told Bonilla that he could not lend him any money *because* Bonilla was involved with the Teamsters. Zarate then warned Bonilla not to get involved with the Union since Zarate was the person giving Bonilla work, and that Bonilla should "thank God" Zarate was giving him that work. Ex. 3, pp. 190-192.

In the days following Zarate's threatening comments, two of Bonilla's coworkers approached him and asked if he was leading the unionizing campaign. Both also revealed to Bonilla that Zarate had asked them to get information on Bonilla's union activities. One also told Bonilla that he should be careful because Zarate could fire him for being involved with the Union, and that Zarate had a list

of drivers who had engaged in union activity. During the first of these conversations, Bonilla flatly denied that he was involved with the Union. During the second, Bonilla listened but avoided responding either way. Ex. 3, pp. 185-187, 194-196.

On about August 21, Zarate again threatened Bonilla because of his support for the Union. Zarate told Bonilla that he had received complaints from other employees that Bonilla had been "fighting" with his coworkers. Further, Zarate warned Bonilla that if he heard any more of these complaints, he would fire Bonilla. Bonilla had not fought with any of his coworkers, and as such, denied Zarate's claim. Zarate responded, ominously, that he knew Bonilla was "involved in something." Ex. 3, pp. 199-200.[7]

On the morning of Friday, August 24, Bonilla reported to work at 7:00am at Respondent's facility and was assigned to transport a cargo container from the facility to a shipping port terminal. After completing that assignment, Respondent's dispatcher, Hugo Sanchez (Sanchez), instructed him return to Respondent's facility to be assigned more work. However, upon arriving there, Sanchez told Bonilla to go see General Manager Zarate. Bonilla complied, but Zarate told him there was no more work that day. Ex. 3, p. 202, 204. This was out of the ordinary since Bonilla typically worked at least eight hours a day, and it was

[7] Bonilla, a native Spanish speaker, testified at the administrative hearing through a Spanish-English interpreter. The interpreter explained that, according to Bonilla's testimony, Zarate used the Spanish word "peleando" when he accused Bonilla of "fighting" with his coworkers. The interpreter further explained that "peleando" could be interpreted into English as "fighting" in a physical sense, but also it could also refer to fighting or struggling alongside others in support of unionization. Ex. 3, pp. 197-198, 343.

only 9:50am. Ex. 3, p. 201. Moreover, there was more work available for Respondent's drivers when Zarate sent Bonilla home early.[8]

After leaving Respondent's facility, Bonilla accompanied Union Organizer Cubillos to a recycling facility in South Gate, California. There, Cubillos attempted to speak to several of Respondent's drivers, but they were not receptive. While those drivers confirmed that joining the Union might provide them job benefits, they believed they would have difficulty finding a new job if they were retaliated against or terminated by Respondent. Ex. 3, pp. 106-107.

The next day, Saturday, August 25, Respondent terminated Bonilla. At 6:41pm on August 25, while Bonilla was out bowling with his family, Zarate called Bonilla on his personal cell phone. After Bonilla answered, Zarate immediately told Bonilla that he did not want him to come back to work, and that he would mail Bonilla his final paycheck. Bonilla was shocked and asked Zarate why he was being terminated. Zarate replied it was because Bonilla was "fighting with [Zarate's] drivers."[9] Ex. 3, p. 207.

After firing Bonilla on August 25, Zarate, on two more occasions - once over the phone on August 27, and once in person on August 31 - told Bonilla that the reason he was terminated was because of his "fighting." On August 27, at 12:52pm, Bonilla called Zarate.[10] At that time, Bonilla was inside the Union's Long Beach, California office with Union Organizer Jamie Welsh. Welsh had been assisting Bonilla with an application for unemployment benefits earlier that day, but they were unsure how to note the reason for Bonilla's termination in the

[8] The parties stipulated that, on August 24, Bonilla worked until 9:50am and that there was work available after 9:50am on that day. Ex. 3, pp. 174-176.
[9] The parties stipulated that Zarate called Bonilla on August 25 at 6:41pm and that the call lasted two minutes. Ex. 3, p. 225.
[10] The parties stipulated that Bonilla called Zarate at 12:52pm and that the call lasted three minutes. Ex. 3, p. 225.

application. With Welsh sitting nearby, Bonilla activated his cellular phone's speakerphone, called Zarate, and asked him why he had been fired. Zarate again said that Bonilla was terminated because he was "fighting" with other drivers. Zarate also stated that he would mail a final paycheck to Bonilla. Ex. 3, pp. 111, 211, 270.

On August 31, Bonilla, accompanied by Union Organizer Adrian Macias (Macias), visited Respondent's facility to pick up Bonilla's final paycheck – which he had not yet received in the mail. While they were at the Respondent's facility, both Macias and Bonilla asked Zarate why he had fired Bonilla. Zarate repeated that the reason was because Bonilla had been having problems with coworkers and "fighting" with them.[11] Ex. 3, p. 284-285, 344.

D. Respondent's Unlawful Conduct Has Silenced Its Employees' Effort to Unionize

Respondent's unfair labor practices have seriously harmed the Union's organizing efforts. Union Organizer Cubillos testified that Respondent's conduct, particularly the shocking termination of Bonilla, has scared its drivers to such an extent that the organizing campaign has essentially stalled. From June until the beginning of August, the Union held at least one meeting per month with Respondent's drivers, and each meeting was attended by at least one newly recruited driver, in addition to those already involved with the Union. Ex. 3, pp. 81-87. However, since Bonilla's termination, none of Respondent's drivers have been willing to attend a Union meeting, and its effect has been to halt the Union's campaign altogether. Several formerly active union supporters have stopped communicating with Cubillos at all. Only one driver, who had previously been an active Union supporter, has been willing to speak to Cubillos since Bonilla's

[11] Throughout the administrative hearing, Respondent falsely claimed that Bonilla voluntarily quit his job and was not fired. However Respondent had no documents that demonstrated that Bonilla quit. Ex. 3, pp. 242-243, 368.

termination. But, even this driver has refused to continue to talk to his coworkers about the Union anymore because, as he told Cubillos, he does not want to be "the next" driver to be terminated. Ex. 3, pp. 126-127. Given the destructive effect of Respondent's conduct, reinstating Bonilla is the only way to reassure Respondent's employees that they have the right to organize and that they cannot be terminated by Respondent for engaging in union activity. Ex. 3, pp. 114, 126-127.

V. DISCUSSION

The grant of a temporary injunction pursuant to Section 10(j) of the Act is "just and proper" under the facts of this case, because Petitioner has a strong likelihood of success on the merits; failure to obtain an injunction will irreparably harm the employees, the Union, and the Board's remedial authority; the balance of the equities tips in favor of granting an injunction; and the public interest will be served by an injunction.

A. There is a Strong Likelihood that Petitioner will Prove Respondent Violated the Act

Here, there is a strong likelihood that Petitioner will establish in the administrative proceedings that Respondent violated Section 8(a)(1) and (3) of the Act as alleged in the Complaint, by engaging in conduct set forth above.

i. On about August 7 and August 21, Respondent Threatened Employee Bonilla With Job Loss

A threat to discharge an employee if they engage in protected conduct is a "classic" unlawful threat within the meaning of the Act. *In Re C.P. Associates., Inc.*, 336 NLRB 167, 172 (2001) and *Omsco, Inc.*, 273 NLRB 872, fn. 2 (1984). The Board has found implied threats of job loss also violate the Act. In *Leather Center, Inc*., 308 NLRB 16 (1992), the Board upheld an ALJ's finding that a supervisor violated section 8(a)(1) when he told an employee that he knew she was talking to other employees about a union, and she should be careful. The ALJ found that "[s]uch remarks constitute a veiled threat of possible repercussions

against [the employee] because of her suspected involvement with the Union…" *Id.* at 27. *Also see NLRB v. Davis*, 642 F.2d 350, 353 (9th Cir. 1981) [employer violated the Act by threatening and interrogating employees for engaging in union activity]; *L'Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1345-47 (9th Cir. 1980) [unlawful interrogations, impression of surveillance, and threat of discharge]; and *NLRB v. Four Winds Indus., Inc.*, 530 F.2d 75, 78 (9th Cir. 1976) [pre-election literature violated Section 8(a)(1) where it was not an objective prediction regarding effect of unionization but rather a "thinly veiled threat" that union support jeopardized employees' jobs].

During their August 7 conversation, Zarate threatened Bonilla with job loss in violation of the Act. By telling Bonilla that he should not get involved with the Union because Zarate was the person giving him work and that Bonilla should "thank God" for the work Zarate was providing him, Zarate clearly intended to convey to Bonilla that he would not provide Bonilla any more work if Bonilla continued supporting the Union.

On about August 21, just days before terminating Bonilla, Zarate told Bonilla that he had received complaints from other employees that Bonilla had been "fighting" with other employees. Further, Zarate warned Bonilla that if he heard any more of these complaints, he would fire Bonilla. Bonilla had not fought with any of his coworkers, and as such, denied Zarate's claim. Zarate responded, ominously, that he knew Bonilla was "involved in something." Zarate's real message was again clear – if Bonilla continued to support the Union, he would be fired. This statement, like Zarate's August 7 comments, was clearly an unlawful threat of job loss.

Therefore, Petitioner has a high likelihood of succeeding on the merits in proving that Respondent violated Section 8(a)(1) of the Act by threatening its employees with job loss if they engaged in protected activities, including union activities.

ii. On August 24, Respondent Refused to Assign Work to Bonilla and, on August 25, Respondent Terminated Bonilla Because of His Union Activity

Section 8(a)(3) of the Act prohibits employers from making changes to employees' terms and conditions of employment in order to discourage union activity, and prohibits employers from taking any retaliatory action (such as a suspension or discharge) against employees for participating in protected and/or union activity.[12] The fact that an alleged discriminatory act and the discriminatee's protected activity were linked in time may add support to Petitioner's case in making this showing. *See Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *Healthcare Employees Local 399 v. NLRB*, 463 F.3d 909, 919-20 (9th Cir. 2006); and *Best Plumbing Supply, Inc.*, 310 NLRB 143, 143 (1993).

Here, prior to being refused work and terminated, Bonilla had engaged in extensive Union activities, including attending Union meetings and speaking frequently with coworkers about the Union. Zarate clearly knew of Bonilla's union activities, as he threatened to terminate Bonilla on multiple occasions because of his union support and denied Bonilla a loan specifically *because* Bonilla was involved with the Union.[13] Zarate also clearly took discriminatory

[12] In cases which turn on an employer's motivation for taking an adverse action (e.g. a suspension or termination), the Petitioner establishes a prima facie case of a violation by demonstrating that (1) the discriminatee engaged in union or other protected concerted activity, (2) the employer knew of that activity, (3) an adverse employment action occurred, and (4) the employer's action was motivated by anti-union animus. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) approving the Board's analysis in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Also see *Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1014-15 (9th Cir. 1999).

[13] At the administrative hearing, Zarate only offered very general denials and did not specifically deny making those threats. Ex. 3, p. 362. Further, Bonilla offered

action against Bonilla: when he sent Bonilla home early on August 24, there was more work for drivers; and then Zarate fired Bonilla the very next day. Bonilla's testimony that Zarate repeatedly told him he was fired for "fighting" with his coworkers is supported by the testimony of Union Organizers Macias and Welsh, who also heard Zarate tell Bonilla he was terminated for fighting. Since Bonilla was a good employee and never physically fought with anyone, the "fighting" clearly refers to Bonilla's fight for unionization of Respondent's employees. This evidence, as well as the fact that Respondent did not contest Bonilla's application for unemployment benefits,[14] make Respondent's claim that Bonilla voluntarily quit his job implausible, at best.

In light of the above, Petitioner is likely to succeed on the merits in proving that Respondent violated Sections 8(a)(1) and (3) of the Act by refusing to assign work to and terminating Bonilla for engaging in protected and Union activity.

B. Interim Injunctive Relief is Just and Proper to Prevent Irreparable Injury to the Employees' Statutory Rights and the Board's Remedial Power

Congress has declared that "encouraging … collective bargaining" is the "policy of the United States."[15] Section 7 of the Act grants employees the decision "to bargain collectively through representatives of their own choosing."[16] Without timely interim relief, Respondent's illegal actions will irreparably harm the national policy encouraging collective bargaining, the employees' right to choose union representation, and the Board's remedial power. In short, Respondent will forever benefit from its illegal conduct.

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uncontradicted testimony that Zarate said he would not give Bonilla a loan because Bonilla was involved with the Union. Ex. 3, p. 190.

[14] Ex. 3, p. 54.

[15] 29 U.S.C. § 151.

[16] *Id.* § 157.

Many Courts of Appeals, including the Ninth Circuit, have recognized that the discriminatory discharge of union activists may effectively nip an organizing campaign in the bud absent interim relief.[17] Indeed, the U.S. District Court for the Central District of California has held that an injunction is warranted to avoid the irreparable harms threatened by such discrimination.[18] Immediately, the terminations can create a leadership void sufficient to derail a campaign.[19] Moreover, the remaining employees, especially those who were undecided about organizing, will often refrain from supporting the union for fear of also losing their jobs.[20] Accordingly, the Ninth Circuit, as well as other Courts of Appeals, has endorsed inferences of irreparable harm based on the unlawful discharges

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[17] *See Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 749 (9th Cir. 1988); *see also Pye v. Excel Case Ready*, 238 F.3d 69, 74-75 (1st Cir. 2001); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1053 (2d Cir. 1980); *Schaub v. W. Mich. Plumbing & Heating, Inc.*, 250 F.3d 962, 971 (6th Cir. 2001); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1572-73 (7th Cir. 1996); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1135 (10th Cir. 2000).

[18] *Rubin v. Am. Reclamation, Inc.*, 2012 WL 3018335 (C.D. Cal. July 24, 2012); *Garcia v. Green Fleet Sys., LLC*, 2014 WL 5343814, 201 LRRM 3124 (C.D. Cal. Oct. 10, 2014).

[19] *See Schaub*, 250 F.3d at 971 (without reinstatement of discriminatee, "there would be no one at the company organizing for the union"); *Electro-Voice*, 83 F.3d at 1573 (organizers' "absence deprives the employees of the leadership they once enjoyed").

[20] *See Pye*, 238 F.3d at 74 ("discharge of active and open union supporters ... risks a serious adverse impact on employee interest in unionization"); *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 576 (2d Cir. 1988) ("Employees are certain to be discouraged from supporting a union if they reasonably believe it will cost them their jobs."); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-13 (2d Cir. 1980) (discharge of union adherents may reasonably "remain in [employees'] memories for a long period"); *Electro-Voice*, 83 F.3d at 1573 ("[T]he employees remaining at the plant know what happened to the terminated employees, and fear that it will happen to them.").

themselves.[21] The risk of irreparable harm is even more acute where, as here, the employer engaged in additional illegal conduct in support of its anti-union campaign.[22]

Indeed, Respondent's conduct has already devastated the nascent organizing drive. With Bonilla out of the workforce, the Union has not been able to organize further meetings with Respondent's drivers. Its other main contacts are not returning the Union's calls or are unwilling to recruit other employees. Without any vocal advocates for the unionization drive, the campaign has predictably ground to a halt.

The employees' organizational effort is doomed unless Bonilla is immediately reinstated under the protection of an interim injunction. "[I]n the labor field, as in few others, time is crucially important in obtaining relief."[23] A final Board reinstatement order cannot revive employee interest in unionization

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[21] *See Frankl v. HTH Corp. (Frankl I)*, 650 F.3d 1334, 1363 (9th Cir. 2011) ("likelihood of success" in proving discriminatory discharge of union activists during organizing drive "largely establishes" likely irreparable harm, absent unusual circumstances); *accord Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967) (independent evidence of irreparable harm not required because illegal discharges during an organizing campaign "operate predictably to destroy or severely inhibit employee interest in union representation, and activity toward that end"); *cf. Bloedorn*, 276 F.3d at 297-98 (interim instatement of employees illegally refused hire just and proper even where "the Director chose not to make an independent case on irreparable harm"). *See also Power Inc. v. NLRB*, 40 F.3d 409, 423 (D.C. Cir. 1994) (holding that the Board properly "concluded that it is 'difficult to imagine any act of management better calculated to chill union support'" than discriminatory layoffs); *NLRB v. Longhorn Transfer Serv., Inc.*, 346 F.2d 1003, 1006 (5th Cir. 1965) ("the discharge of a leading union advocate is a most effective method of undermining a union organizational effort").

[22] *See, e.g., Electro-Voice*, 83 F.3d at 1570 (explaining coercive impact of illegal conduct including solicitation of employee grievances, questioning about union activity, and threatening plant closure).

[23] *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967).

because it will not come until years after the discharges[24]—too late to erase their chilling effect.[25] By that time, the remaining employees will have seen that workers who "attempted to exercise rights protected by the Act had been discharged" and waited for "years to have [their] rights vindicated."[26] At that point, no worker "in his right mind" will participate in a union campaign.[27] This is exactly the type of irreparable harm Section 10(j) is designed to address.[28] Furthermore, by the time the Board can act, the discharged activist will likely have taken another job and be unavailable for reinstatement, itself an irreparable injury to the unionization effort.[29] Thus, Respondent will succeed in permanently frustrating the employees' right to freely choose union representation. The Board's order will be an "empty formality."[30]

Immediate reinstatement of Bonilla offers the best chance of avoiding this unjust result.[31] Despite Respondent's egregious conduct, the Union still enjoys

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[24] *See, e.g.*, *Lineback v. Irving Ready-Mix, Inc.*, 653 F.3d 566, 570 (7th Cir. 2011) (noting the "notoriously glacial" pace of Board proceedings).

[25] *See Pye*, 238 F.3d at 75 (unremedied interference with unionization effort "would make the Board's remedial process ineffective simply because it is not immediate"); *Electro-Voice*, 83 F.3d at 1573 ("As time passes, … the spark to organize is extinguished.").

[26] *Silverman v. Whittal & Shon, Inc.*, 125 LRRM 2150, 1986 WL 15735, at *1 (S.D.N.Y. 1986).

[27] *Id.*

[28] *Pye*, 238 F.3d at 75.

[29] *See Aguayo*, 853 F.2d at 749; *Pye*, 238 F.3d at 75; *Electro-Voice*, 83 F.3d at 1573. *See generally* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1792-93 (1983) (studies show significant decline in proportion of discriminatees accepting reinstatement when offered more than six months after discriminatory act), cited with approval in *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1094 n.32 (3d Cir. 1984).

[30] *Angle*, 382 F.2d at 660.

[31] *Id.* at 661. (interim reinstatement is "best visible means" of rectifying chill of protected activity); *Schaub*, 250 F.3d at 971 (interim reinstatement of discharged union activist "combats the substantially diminished prospects of unionizing [the

some support among the employees. Because fear of retaliation may completely extinguish employee willingness to support the Union by the time a Board order issues, interim reinstatement is necessary now to erase the chill before it is too late to prevent remedial failure.[32] It will mitigate the chilling effect on the organizing campaign by sending an affirmative signal that the Union, the Board, and the courts will *timely* protect employees if they face retaliation for supporting the Union.[33] Indeed, Bonilla still desires reinstatement, and the Union intends to resume organizing under the protection of an injunction.

The other requested relief is also just and proper. A cease-and-desist order is "a standard part of a [Section] 10(j) preliminary injunction."[34] Additionally, reading of the district court's order in front of the employees and a representative of the Board is an "effective but *moderate* way to let in a warming wind of

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employer] if [the discriminatee] were not to return until after the Board reached a final resolution of th[e] case").

[32] *See Aguayo*, 853 F.2d at 746, 749 (finding reinstatement of eleven members of organizing committee "just and proper"); *Schaub*, 250 F.3d at 971 (one employee organizer); *Pye*, 238 F.3d at 75 (five employee organizers); *Sharp*, 225 F.3d at 1135 (six union supporters); *Angle*, 382 F.2d at 660-61 (four employee organizers).

[33] *See Aguayo*, 853 F.2d at 750 (interim reinstatement "would revive the union's organizational campaign"); *NLRB v. Ona Corp.*, 605 F. Supp. 874, 886 (N.D. Ala. 1985) (interim reinstatement of single discriminatee in large unit will send "affirmative signal"); *see also Pye*, 238 F.3d at 75 (interim reinstatement of union supporters appropriate to preserve "spark to unionize"); *Kaynard*, 625 F.2d at 1053 (reinstatement of "active and open" union supporters just and proper to avoid "serious adverse impact on employee interest in unionization"); *Sharp*, 225 F.3d at 1135 (interim reinstatement "reasonably necessary to preserve the ultimate remedial power of the Board").

[34] *Paulsen v. PrimeFlight Aviation Servs., Inc.*, 718 F. App'x 42, 45 (2d Cir. 2017) (summary order); see also, e.g., *Hooks v. Ozburn-Hessey Logistics, LLC*, 775 F. Supp. 2d 1029, 1052 (W.D. Tenn. 2011) (cease-and-desist order appropriate "to prevent irreparable chilling of support for the Union among employees and to protect the NLRB's remedial powers.").

information and, more important, reassurance."[35] Posting the order during the pendency of the administrative proceedings will further inform and reassure employees of their rights.[36]

While avoiding irreparable harm to employee Section 7 rights and the Board's remedial ability, interim relief will pose little harm to Respondent. Any harm the company might suffer as a result of a temporary injunction "will only last until the Board's final determination."[37] In the interim, Respondent will receive the experienced services of Bonilla and will retain its managerial right to impose lawful discipline.[38] Moreover, in the event Respondent has hired a replacement for Bonilla, it is well settled that the Section 7 rights of discriminatees to interim reinstatement under Section 10(j) outweigh the job rights of their replacements.[39] The remaining proposed remedies are even less likely to pose a significant burden on Respondent. Accordingly, the balance of hardships tips in the Board's favor.

In sum, interim relief will vindicate the employees' statutory right to a free choice regarding unionization and preserve the Board's remedial power. In addition, it will serve the public interest by effectuating the will of Congress and ensuring that Respondent's unfair labor practices do not permanently succeed.[40]

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[35] *United Nurses Assocs. of Cal. v. NLRB*, 871 F.3d 767, 788-89 (9th Cir. 2017) (emphasis in original)(internal citation omitted); *see also Norelli v. HTH Corp.*, 699 F. Supp. 2d 1176, 1206-07 (D. Haw. 2010) (ordering reading of court order), *affirmed*, 650 F.3d 1334 (9th Cir. 2011); *Rubin v. Vista del Sol Health Services, Inc.*, 2015 WL 306292, at *2 (C.D. Cal. Jan. 22, 2015); *Overstreet v. One Call Locators Ltd.*, 46 F. Supp. 3d 918, 932 (D. Ariz. 2014); *Garcia v. Sacramento Coca-Cola Bottling Co.*, 733 F. Supp. 2d 1201, 1218 (E.D. Cal. 2010).

[36] *See, e.g.*, *Norelli*, 699 F. Supp. 2d at 1207 (ordering posting).

[37] *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 28 (1st Cir. 1986).

[38] *See Electro-Voice*, 83 F.3d at 1573; *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 906 (3d Cir. 1981); *Pye*, 238 F.3d at 75.

[39] *See Aguayo*, 853 F.2d at 750.

[40] *See Frankl I*, 650 F.3d at 1365 ("In § 10(j) cases, the public interest is to ensure that an unfair labor practice will not succeed…."); *Pye*, 238 F.3d at 75 ("Section

VI. CONCLUSION

Interim relief is just and proper to prevent further frustration of the policies and remedial purposes of the Act. The Petitioner has shown a strong likelihood of prevailing in the administrative proceeding before the Board and establishing that Respondent has committed violations of Sections 8(a)(1) and (3) of the Act. Accordingly, Petitioner respectfully requests that this Court grant the requested injunctive relief.

Dated at Los Angeles, California, this 29th day of January, 2019.

Respectfully submitted,

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10(j) interim relief is designed to prevent employers from using unfair labor practices in the short run to permanently destroy employee interest in collective bargaining."); *Asseo*, 805 F.2d at 28 ("[T]he public has an interest in ensuring that the purposes of the Act be furthered.").